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IMPLEMENTATION OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978—1981-82

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Mr. BAKER (for Mr. GOLDWATER) from the Select Committee on Intelligence, submitted the following

REPORT

together with

ADDITIONAL AND SEPARATE VIEWS

I. INTRODUCTION

Section 108 of the Foreign Intelligence Surveillance Act of 1978 (92 Stat. 1783, 50 U.S.C. 1808) provides as follows for Congressional oversight of implementation of the Act and for consideration of the need for amendments:

> CONGRESSIONAL OVERSIGHT
>
> SEC. 108 (a) On a semiannual basis the Attorney General shall fully inform the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence concerning all electronic surveillance under this title. Nothing in this title shall be deemed to limit the authority and responsibility of the appropriate committees of each House of Congress to obtain such information as they may need to carry out their respective functions and duties.
>
> (b) On or before one year after the effective date of this Act and on the same day each year for four years thereafter, the Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence shall report respectively to the House of Representatives and the Senate, concerning the implementation of this Act. Said reports shall include but not be limited to an analysis and recommendations concerning whether this Act should be (1) amended, (2) replaced, or (3) permitted to continue in effect without amendment.

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This is the fourth annual report of the Select Committee on Intelligence to the Senate concerning the implementation of the Act. It reviews, in an unclassified report, information received from the Attorney General in classified reports covering the periods September 1, 1981–December 31, 1981 and January 1, 1982–June 30, 1982. The Attorney General adopted a recommendation made by the Committee last year that the time periods covered by these semiannual reports should coincide with the calendar year periods covered by the unclassified statistical reports submitted to Congress pursuant to Section 107 of the Act. Henceforth, the two semiannual classified reports for each calendar year will have the same statistical base as the annual public report. This action also lessens the administrative workload involved in preparing these reports.

The written reports have been supplemented by additional information provided at periodic meetings with representatives of the Attorney General and the agencies involved in electronic surveillance conducted under the Act. In this manner, the Committee has continued to be kept informed of all electronic surveillance conducted under the Act.

II. STATISTICAL REPORT

In April 1982, Attorney General William French Smith submitted the following unclassified report to the Congress and the Administrative Office of the United States Courts pursuant to Section 107 of the Act:

> During calendar year 1981, 431 applications were made for orders and extensions of orders approving electronic surveillance under the Act. The United States Foreign Intelligence Surveillance Court issued 433 orders granting authority to the Government for the requested electronic surveillance. No orders were entered which modified or denied the requested authority.

The comparable statistics for 1980 (the first full year the Act was in effect) were 319 applications and 322 orders.[1] The number of applications and orders does not necessarily reflect an equal number of surveillances. More than one order may be issued for a single surveillance if, for instance, a 90-day surveillance order is extended for additional 90-day periods during the year. Also, a single order may authorize electronic surveillance of a particular target at more than one location.

A detailed breakdown of the number of surveillances of foreign powers and agents of foreign powers in various categories is included in the Attorney General's semiannual classified reports to the Select Committee.

III. DESIGNATION OF JUDGES

The terms of the first seven federal district judges designated by the Chief Justice of the United States to serve on the Foreign Intelligence Surveillance Court were staggered in accordance with the Act so that one term expires every year. In the case of the three-judge court of

[1] From May, 1979, when the Act went into effect, until the end of 1979, there were 199 applications and 207 orders. Similar statistics are published for law enforcement surveillances. During 1979, 553 application for law enforcement warrants were made to federal and state judges, and none was denied.

review, the terms expire every two or three years. In 1981 Honorable Lawrence Warren Pierce, U.S. District Court, Southern District of New York, whose term expired in 1984, was elevated to the U.S. Court of Appeals. The Chief Justice designated Honorable Dudley Bonsal, U.S. District Court, Southern District of New York, to serve the remainder of his term. In May 1982, the term expired for Honorable George L. Hart, senior judge, U.S. District Court, District of Columbia. The Chief Justice designated Honorable John Lewis Smith, Jr., U.S. District Court, District of Columbia, as his successor to serve a full seven-year term. Judge Smith serves as presiding judge of the Foreign Intelligence Surveillance Court. The other members are Honorable Frank J. McGarr. U.S. District Court, Northern District of Illinois; Honorable Frederick B. Lacey, U.S. District Court, District of New Jersey; Honorable Albert V. Bryan, Jr., U.S. District Court, Eastern District of Virginia; Honorable William C. O'Kelley, U.S. District Court, Northern District of Georgia; and Honorable Frederick A. Daugherty, U.S. District Court, Western District of Oklahoma. The members of the court of review are Honorable James E. Barrett, U.S. Court of Appeals for the Tenth Circuit; Honorable A. Leon Higgenbotham, Jr., U.S. Court of Appeals for the Third Circuit; and Honorable John A. Field, Jr., U.S. Court of Appeals for the Fourth Circuit. Judge Field was designated to succeed Honorable George Edward MacKinnon, U.S. Court of Appeals for the District of Columbia Circuit, whose term expired in May 1982.

IV. IMPLEMENTATION OF THE ACT

The Attorney General reported to the Select Committee that during the period September 1, 1881, through June 30, 1982, the Foreign Intelligence Surveillance Court continued to sit approximately twice a month to consider applications brought by the Federal Bureau of Investigation, by the National Security Agency, and (in the first six months of 1982) by another agency of the Intelligence Community. These intelligence agencies were represented before the Court by attorneys from the Office of Intelligence Policy and Review of the Department of Justice. Officials of the agencies appeared as applicants. The Attorney General's reports set forth a detailed accounting of both the applications submitted to the Court and the certifications made by the Attorney General.

According to the Attorney General, issues involving the Foreign Intelligence Surveillance Act have arisen in five federal cases. In two of these cases, the government was not introducing into evidence any information derived from surveillances under the Act. Thus, the only issue was the legality of the surveillances on which defendants were overheard. In both these cases, *United States* v. *Zacharski, et al.*, No. 81–679–kn, (C.D. Calif., Order of Judge Kenyon dated September 23, 1981) and *United States* v. *Belfield, et al.*, Misc. No. 81–0215 (D.D.C., Order of Judge Gasch dated October 22, 1982), the surveillances were held lawful. On November 5, 1982 *Belfield* was affirmed. —— F2 —— (DC 1982). Zacharski has filed notice of appeal.

Of the remaining cases, *United States* v. *Lt. Cooke*, C.A. No. JH–81–2416 (D.Md.) was dismissed as moot. In *United States* v. *Thomas Falvey, et al.*, No. 81 CR–423 (S–1) (E.D.N.Y.), the issues involv-

ing the Foreign Intelligence Surveillance Act were examined thoroughly, and the Court upheld the constitutionality of the statute, the legality of the electronic surveillance, and the review procedures set forth in the statute. In the most recent case, *United States* v. *Kozibioukian*, CR. N 82–460 (C.D.Cal.), the Government notified the Court and the defendant that he was the subject of electronic surveillance authorized under the Foreign Intelligence Surveillance Act.

Another legal development bearing on implementation of the Act was President Reagan's issuance on December 8, 1981 of Executive Order 12333 on United States Intelligence Activities. This order retained the requirement from the previous order that U.S. intelligence agencies must comply with the Act. Section 2.5 of Executive Order 12333 includes the following statement:

> Electronic surveillance, as defined in the Foreign Intelligence Surveillance Act of 1978, shall be conducted in accordance with that Act, as well as this Order.[2]
>
> This requirement does not affect electronic surveillance for law enforcement purposes governed primarily by Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[3]

The Attorney General has reported a few irregularities that occurred during the execution of electronic surveillance orders under the Act. In each case both the Court and the President's Intelligence Oversight Board were also notified of the incident. As described by the Attorney General, the discrepancies were inadvertent and were promptly remedied upon discovery. For example, one surveillance continued for less than 24 hours beyond the period authorized by the Court Order. The Committee has been given an explanation of these incidents, including the measures taken to protect the rights of individuals and prevent recurrencces. While regretable, these incidents do not indicate willful noncompliance with the Act.

In line with its original intent, the Committee has sought to oversee compliance with the minimization requirements of the Act by looking for "careful deliberation" by Executive branch officials in devising the procedures and applying them to particular cases. In addition, the Committee has continued to review the classified procedures to ensure that they adequately accommodate privacy interests with sophisticated surveillance technology.[4]

To accomplish these oversight objectives, the Committee designated senior staff to meet at least semiannually with representatives of the Attorney General and the agencies that conduct surveillance under the Act. At these meetings the Committee staff discussed with agency representatives such matters as the volume of dissemination of certain types of information, the monitoring by the Attorney General's representatives of compliance with the procedures, and examples of "close judgment calls" of the type contemplated in the legislative his-

[2] Section 2–202 of Executive Order 12036, as amended by Executive Order 12139, May 23, 1979, had previously stated: "Any electronic surveillance, as defined in the Foreign Intelligence Surveillance Act of 1978, shall be conducted in accordance with that Act as well as this Order."

[3] Section 2.2 of Executive Order 12333 includes the statement: "Nothing in this Order shall be construed to apply to or interfere with any authorized civil or criminal law enforcement responsibility of any department or agency."

[4] The Committee's intent with regard to minimization procedures is discussed in Senate Report No. 95–701, pp. 39–44.

tory. These meetings also kept the Committee abreast of the various surveillance techniques employed, their impact on privacy interests, and the privacy safeguards embodied in the minimization procedures. The discussions were not limited to formal procedures, but also covered additional details regarding the administrative practices of each agency. In some circumstances, these internal agency practices and rules supply greater privacy safeguards than the formal procedures promulgated pursuant to the statute.

Apart from meetings devoted specifically to oversight of implementation of the Act, the Committee is kept informed of electronic surveillance practices in the course of its other duties. For example, Committee members have raised questions about aspects of minimization procedures at closed hearings with senior officials of the Intelligence Community. Committee staff have visited both headquarters and field installations of relevant agencies to observe monitoring practices and talk with personnel engaged in surveillance activities, as part of more comprehensive oversight of intelligence operations. Information about surveillance technology is provided in agency budget materials submmitted to the Committee; and questions about limits on the use of information about U.S. persons arise when the Committee is assessing the quality of U.S. foreign intelligence and counterintelligence collection.

On the basis of this information, the Committee is satisfied that the minimization procedures adopted under the Act are reasonably designed to achieve required purposes and that the Executive branch has established adequate mechanisms to monitor compliance.[5]

V. RECOMMENDATIONS

The Committee's previous reports have discussed four amendments to the Foreign Intelligence Surveillance Act that were proposed by the Executive branch in past years. Although the Administration did not renew these proposals in 1982, the Committee has continued to assess the need for such amendments in consultation with the Justice Department and the principal agencies that conduct surveillance under the Act. Representatives of the Attorney General and the FBI have also called to the attention of the Committee the possible need to alleviate administrative burdens by lengthening the 90-day time limit on surveillance orders for cases involving officers of hostile foreign intelligence services (not United States persons).

The Foreign Intelligence Surveillance Act does not authorize the use of physical search techniques to collect foreign intelligence information. The Justice Department contends that the President and, by delegation, the Attorney General have constitutional authority to approve warrantless physical searches directed against foreign powers or their agents for intelligence purposes. The issue of such authority has not been addressed by Congress or the Supreme Court. The Justice Department has agreed to inform the Committee fully regarding exercise of any such authority to conduct searches within the United States and searches abroad involving the property of United States persons. Committee staff and representatives of the

[5] Copies of declassified versions of sample minimization procedures adopted pursuant to the Act may be obtained fromthe Committee on request. *See also* 12 *Rutgers L.J.* 492–511 (1981).

Attorney General have examined both practical and legal questions involved in the use of such techniques. The Committee believes that consideration should be given to the possibility of amending the Foreign Intelligence Surveillance Act to provide a statutory basis for physical searches in the United States for intelligence purposes. The Committee expects to hold hearings on this matter next year.

The Foreign Intelligence Surveillance Act has been in full effect since mid-1979. In 1983, the Committee will submit to the Senate the last report required by the Act. This report will provide the Committee an opportunity to sum up its experience with implementation of the provisions of the Act over five years. The Committee expects to review that experience and prepare both a public report and a classified report on how the Act has worked in practice. The report will also describe any changes that may be needed in the Act itself and in the implementing procedures and policies of the relevant agencies. Related techniques such as physical search could be included in this review, and Committee hearings on possible amendments may be desirable. Pending the results of this assessment, the Committee recommends that the Foreign Intelligence Surveillance Act continue in effect without amendment.

ADDITIONAL VIEWS OF SENATOR DANIEL PATRICK MOYNIHAN, VICE CHAIRMAN

In this our fourth annual report on the implementation of the Foreign Intelligence Surveillance Act of 1978 we do well to recall the circumstances which led to its enactment.

Executive Branch and Congressional investigations exposed serious abuses involving electronic surveillance without warrant. President Ford and later President Carter responded with Executive Orders to control this sort of behavior. While the effort at self-regulation by the Executive Branch was successful in eliminating abuse, both Administrations, with strong bipartisan support in the Senate, pressed for enactment of a statutory framework of electronic surveillance for intelligence purposes in the United States.

Thus, although the wrong had disappeared, it made sense to construct some permanent barriers against its possible recurrence. There also seemed to be a second and, perhaps, more subtly compelling, reason propelling FISA forward. The combination of the absence of clear statutory guidance coupled with the incessant public criticism focused on the intelligence agencies contributed to a sense of uncertainty within those agencies as to their authority. In those days, former intelligence officials were the subjects of criminal investigations and charges which, in some notable instances, led to convictions. This could only have engendered a reluctance on the part of intelligence personnel to take initiatives which might risk a subsequent charge that they have violated the law.

In this context, FISA was more than a fitting monument to the solemn regard with which we hold the privacy of Americans. It was also an effort to provide legislative sanction in an area previously left virtually entirely to Executive discretion. But the form of sanction is modelled on the criminal law. The Act is therefore essentially a lawyer's document, complete with the norms of a judicial warrant issued by a special court.

When the Senate passed what became the Foreign Intelligence Surveillance Act of 1978, I observed that we were entering "virgin legislative territory," for until then, no nation in the world had tried to subject its foreign intelligence agencies to the strict rule of law. I noted that this legislation presented two risks: First. it might unduly restrict our intelligence agencies and so endanger our national security; or, second, it might so distort the procedures and traditions of the judiciary as to weaken the protection it can afford individual citizens and aliens to force it to make inherently administrative—that is, non-judicial—decisions, and ultimately, to dissipate the high prestige with which the judiciary is held and on which this law so heavily relies.

Four years have now passed since FISA was enacted into law and the concerns I raised then still exist.

For example, to date the FISA Court has not rejected a single FISA application presented by either the Carter or Reagan Administration. As a result, a public perception may well be developing that the Court has become a "rubber stamp" for the wishes of the Executive Branch. Given that perception it is not at all unlikely that we will soon find the sentiment that Congress exercise even closer scrutiny of the Court's decisions—in effect, becoming the FISA Court's court of appeals.[6]

Whatever the perception, the evidence available to the Committee indicates that the Court has not rejected any application because it has felt no need to do so. The very fact that the Court exists has impelled the Executive Branch to "scrub" its applications so thoroughly that only the clearest cases are in fact brought forward to the FISA Court. Instead of the Court becoming a captive of the decision-making process of the Executive it might be argued that quite the reverse has occurred: that Executive initiative has been informed by judicial restraint.

However one views this analysis, the fact remains that, as the Court must work in secret, it is unable to defend its decisions by the publication of its opinions. Have we not come to that point in time in which the Court, in order to preserve its reputation, might consider rejecting an application not so much on the merits of the particular case, but because it feels compelled to distance itself from the Executive Branch?

In other words, have we not with FISA created a situation which tempts the Court to act politically so as to appear apolitical, or, if it does not so act, as is more likely, leads to the opinion that it has become politicized by acting as a surrogate of the Executive.

Lest there be any confusion, I wish to emphasize that I am advocating only a careful assessment of the merits of FISA. As I have attempted to indicate, I believe there are serious questions to be addressed concerning the effects of the Act on the institutional independence of the three branches of government. Yet whatever its shortcoming, we would do well to remember that the Act reflects a consensus, perhaps a fragile one, but a consensus nonetheless, forged after great difficulty in a period of political turmoil.[7] In consequence, the benefits of any major change in the Act must be weighed against the risks of reopening old divisions.

DANIEL PATRICK MOYNIHAN.

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[6] Insofar as our Committee's oversight is concerned, we have not made intensive case-by-case reviews. This is primarily the responsibility of the Executive Branch and the FISA Court. However, we have received sufficient information to give a reasonable basis for belief that the rights of Americans have not been infringed. Indeed, the surveillance activity under the Act is directed principally against non-U.S. person targets.

[7] In our first four reports we have recommended that the Act continue in effect. To an important extent, this conclusion reflects what I understand to be the general satisfaction on the part of our intelligence agencies with the clear legal authority the Act provides. For the reasons cited above, this is no small achievement. As the report points out, recent court decisions have upheld the constitutionality of the Act, including one by the U.S. Court of Appeals for the District of Columbia Circuit (*United States* v. *Belfield*, No. 81–2152, decided Nov. 5, 1982). Writing for that Court, Judge Wilkey, joined by Judges Bork and Scalia noted that:

> In FISA, Congress has made a thoroughly reasonable attempt to balance the competing consensus of individual privacy and foreign intelligence.

Continuing, Judge Wilkey said that:

> If anything, the legality inquiry mandated by FISA is easier for a court to perform ex parte than the pre-FISA inquiry into the legality of warrantless electronic surveillance. Previously, courts had to determine whether the surveillance fell within the President's inherent power to conduct electronic surveillance for foreign intelligence purposes. The FISA inquiry at issue here is merely to determine whether the application and order comply with the statutory requirements. In this case it is evident that they do. Furthermore, . . . FISA incorporates non-judicial safeguards [i.e., Executive Branch controls and Congressional oversight] to ensure the legality of the surveillance.

ADDITIONAL VIEWS OF SENATOR MALCOLM WALLOP ON THE FOREIGN INTELLIGENCE SURVEILLANCE ACT REPORT

The report takes a partial view of the reasons why the Congress wrote into the Act the requirement for continuing close oversight. True, there were concerns that the Act might not be administered as efficiently as it could, and concerns that the minimization procedures might not be well applied. This Committee's oversight on these matters has been thorough. But in 1978 I and many others raised another set of concerns about the very compatibility of FISA's secret court with our judicial system and with the intelligence business. The oversight and the annual reviews were supposed to address these concerns as well. They have not, and this report reflects this concentration on quite another agenda.

Let me briefly restate those concerns, and the reasons why I believe they are weightier now than they were four years ago. Secret ex-parte proceedings not intended to contribute to open adversarial ones, while common in the Napoleonic judicial system found in much of the rest of the world, heretofore had been foreign to ours. In those other systems, the impact of such proceedings on civil liberties is mitigated by the general understanding that the first stage of the judicial process occurs on behalf of the executive power. There is no illusion of impartiality in the first stage of judicial proceedings. They are seen for what they are and can be challenged as such. Not so here and elsewhere in the English-speaking world. Here the prestige of all judges is much greater, and court decisions are widely supposed to have settled an issue.

I can understand why bureaucrats would desire the prior approval of judicial authority for their activities: It guarantees that they will not be challenged. I can also understand that, for the sake of this, the bureaucrats would trade much in the way of operational latitude and would accept lengthy formalities and restrictions. Above all for the sake of this protection they are willing to accept the proposition that the President may not carry out a part of his constitutional duties as Commander in Chief unless he receives prior specific judicial approval. That is why we have seen a peculiar alliance in support of FISA: The left, in some cases the far left, and the intelligence bureaucracy. They both get different things from this law. But what is the law's net effect on the country?

The net effect has been to confuse intelligence gathering with criminal law, and to enmesh intelligence in procedures which are wholly inappropriate to it. In law enforcement the purpose of surveillance is to prosecute the guilty. In intelligence, the purpose of surveillance is to gather information which should not be used for or against any individual, but to safeguard the country from foreign enemies. The proper cure for abuses of surveillance for purposes of intelligence is examination after the fact, and punishment of those who abuse their trust. But it is nonsense to think one can draw up a formula

beforehand which will ensure that everyone is surveilled who should be. It is constitutionally wrong to make the President's exercise of his constitutional duties in foreign policy and defense contingent upon specific judicial approval. The Fourth Amendment mandates no such thing. No such notion was dreamt of by the framers of the Fourth Amendment. Even the Supreme Court's decision in 1972, in the *Keith* case points in this direction only obliquely. At any rate, we now have four years' experience with the application of the "criminal standard" to intelligence.

The law has tended to produce intelligence operations that are both stylized and unchallengeable. Now, it would have been useful had our staff worked to tell what, given the environment of the 80's, should be the role of electronic surveillance in the gathering of intelligence. Then they could have investigated how FISA had affected the agencies' performance in that role. But that is not the sort of report we have before us.

In 1978 I also warned that the sanction of a secret court would be so attractive that people would quickly try to expand the role of secret judicial proceedings. Well, in the legal realm we soon saw passage of the greymail statute, which allows a judge to decide in secret and solely on the basis of the intelligence agencies' arguments, that evidence is too sensitive to be allowed. This statute is justifiable on its own terms if taken by itself. But the overall trend is worrisome. Beyond the law, in 1979 and 1980, the Justice Department sought to use the secret court to authorize physical searches. I, among others, objected that this was not within the court's specified jurisdiction. I was met with the argument that there exists an inherent judicial power, that is, that any judge may decide any case. But this argument too clearly led to the conclusion that the secret court could do anything. After November 1980, we heard no more about it. Instead we began to hear suggestions that we pass legislation to give the FISA court the power to authorize physical searches.

I and, I think, many others object to giving such power for the very reasons we had reservations about the secret court in the first place.

Let me be very clear: This Committee has never met to consider how FISA has functioned. It has never met to entertain the notion of expanding the court's powers and thereby reduce the President's. I think that if this Committee meets on FISA at all it should do so to question its very existence.

Let there be no mistake: I do not mean to advocate a change in the law to put defense attorneys in the special court. Indeed I strongly oppose revealing intelligence matters to more and more people. But I do think that the court's advocates must face the fact that, when a court is established under our system with something like final authority in a class of matters, the demand for the exercise of an adversarial function is a natural one. Had they wanted to avoid the demand, they should not have established the court.

Let there also be no misunderstanding: I do not think that any act of electronic surveillance under the law has been improper, or that there has been too much surveillance. Rather I object to the mental strictures which the existence of these procedures has placed on the intelligence bureaucracy. If ever there was a field of endeavor where a-priori procedures and self-covering schemes tend to drive out responsible judgment, that field is intelligence.

MALCOLM WALLOP.

ADDITIONAL VIEWS OF SENATOR HUDDLESTON

The report of the Select Committee emphasizes the need for hearings to assess the implementation of the Foreign Intelligence Surveillance Act and to consider related matters such as the use of physical search techniques to obtain foreign intelligence. I endorse the report, and I want to place special emphasis on the need for the Committee to review carefully the conduct of electronic surveillance and physical search for intelligence purposes. The Select Committee has not held hearings on this subject since the Act took full effect in 1979. The information provided by the Attorney General and the agencies to staff of the Select Committee has been helpful, but it is important for all Members to have a full and accurate understanding of these issues.

The role of the Foreign Intelligence Surveillance Court is especially significant because of the basic constitutional principle of the Fourth Amendment that intrusions into privacy should be sanctioned by an independent judicial magistrate. The Supreme Court stated this principle clearly in *United States* v. *United States District Court* (the Keith Case), 407 U.S. 297 (1972):

> The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionality sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.
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> The Fourth Amendment contemplates prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions and levels of Government. The independent check upon executive discretion is not satisfied . . . by "extremely limited" post-surveillance judicial review. Indeed, post-surveillance review would never reach the surveillance which failed to result in prosecutions. Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights.

Justice Lewis Powell, who wrote the Court's opinion, recognized that the Supreme Court itself could not fashion the special judicial

arrangements that would be necessary to provide for judicial review in cases involving the national security. He suggested, however, that the Congress could do so:

> Congress may wish to consider protective standards . . . which differ from those already prescribed for specified crimes in Title III. Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant requirement may vary according to the governmental interest to be enforced and the nature of the citizen rights deserving protection.
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> It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of [Title III]; that the request for prior court authorization could, in sensitive cases, be made to any member of a specially designated court . . . ; and that the time and reporting requirements need not be so strict as those in [Title III].

The Congress followed this guidance in framing the Foreign Intelligence Surveillance Act. While the Court's decision in the *Keith* case did not specifically deal with foreign intelligence, the principles set forth in Justice Powell's opinion helped to resolve the perplexing dilemma of national security wiretapping that had plagued the Government and troubled many citizens after Watergate.

Those who would re-open the debate over this legislation bear a heavy burden of showing that an alternative procedure would better achieve the purposes of the Fourth Amendment as stated by the Supreme Court.

Recent events make it all the more necessary for us to heed the warning that Justice Powell eloquently wrote in 1972:

> National securty cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of "ordinary" crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. "Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power," *Marcus* v. *Search Warrant*, 367 U.S. 717, 724 (1961). History abundantly documents the tendence of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become all the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.
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> The price of lawful public dissent must not be dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous dissent and discussion of Government action in private con-

veration. For private dissent, no less than open public discourse, is essential to our free society.

At a time when attention is being given to the involvement of foreign agents in domestic dissent, the values articulated by the Supreme Court and followed by the Congress in the Foreign Intelligence Surveillance Act shold be reaffirmed as vital for the protection of constitutional rights.

Neither the statute nor the court guarantees that mistakes will not be made. That is why oversight by the Intelligence Committees is an integral part of the law. The active role played by all three branches best comports with the Supreme Court's view "that individual freedoms will best be preserved through a separation of powers and division of functions and levels of Government."

WALTER D. HUDDLESTON.

SEPARATE VIEWS OF SENATOR BIDEN

I concur with the Committee's Annual Report and find that the implementation of the Foreign Intelligence Surveillance Act has been diligent and beneficial to the effective conduct of U.S. intelligence activities. There are, however, questions about the implementation of this Act which a concerned citizen might be expected to ask, but which I am afraid this report does not answer.

Some of these questions simply cannot find answers in a public report because they touch on properly classified information. In many cases the Committee has examined these issues and is satisfied with the manner in which the FISA is being implemented. For example, an important question that the report suggests regards how many of the 433 orders granted to the Government for electronic surveillance during calendar year 1981 covered U.S. persons. The answer to this question is properly classified and therefore not to be found in this report. It is available to the Committee though and does not, to my mind, provoke concern about whether the Act has been prudently applied.

There are, however, a very few questions that the report raises to which we do not currently have satisfactory answers, classified or not. I have no reason to believe that they cannot be appropriately answered. But before the Committee issues its final report under the Act next year, the Committee should give further study to these issues.

To be specific, the report contains the judgment that "the minimization procedures adopted under the Act are reasonably designed to achieve required purposes and that the executive branch has established adequate mechanisms to monitor compliance". Yet the report does not make a specific judgment on whether all or any of the 431 applications were adequately supported by the executive branch or the 433 orders were properly granted by the Foreign Intelligence Surveillance Court. Under the Act, the primary responsibility for compliance has been vested with the Attorney General, subject to independent judicial approval. An important additional check is provided through the legislative oversight of this Committee, as well as its House counterpart. Based upon the reports of the Attorney General and the information provided by the Justice Department and intelligence agencies to the staff, it appears that the Act has been implemented in a proper fashion and that the targets of electronic surveillance have been appropriate ones.

However, the Committee's oversight could and should be strengthened by making a comprehensive review of a representative number of specific cases, including especially the examination of all the relevant documentation. Although the Committee staff currently receives descriptive briefings on FISA surveillances, this sort of detailed review of specific cases is not now performed. Numerical breakdowns, analyses of procedures, and briefings are not a full substitute. The FISA Court

is of necessity a secret one, and periodic in-depth scrutiny by the legislative branch is required to assure that it carries out functions in accordance with the intent of the Act.

I believe that the Committee should consider the results of these case examinations in the hearings called for in the report. With enhanced oversight, the Committee's final annual report should be able to provide more detailed judgments and assurances concerning the administration of the Act.

JOE BIDEN.

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